In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1476

AUGUSTINE FERRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1971. The petition for a writ of certiorari was filed on March 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States Commissioner properly found, on the basis of the affidavit submitted, that there was probable cause to issue search warrants.

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2. Whether, even if the search warrants were invalid, petitioner had a right forcibly to resist their execution by government agents.

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on three counts of assaulting and resisting government agents of the Internal Revenue Service in the performance of their official duties, in violation of 18 U.S.C. 111. He was sentenced to imprisonment for ninety days and fined $500. The court of appeals affirmed (Pet. App. A).

On May 5, 1967, special agents Kish, Martin and Ziemba of the Internal Revenue Service were assigned to conduct searches under two warrants, one for apartment 4–C, 1806 Patricia Lane, East McKeesport, Pennsylvania, and another for the person of "John Doe," described in the warrant as a "white male, with black wavy hair and stocky build observed using the telephone in apartment 4–C." The two warrants specified gambling paraphernalia as the object of the searches (App. 85a–86a, 335a–336a, 339a–340a).[1]

The United States Commissioner had issued the warrants the preceding day on the basis of a lengthy "master" affidavit sworn to by special agent Hooper (App. 342a–381a). Hooper stated in the affidavit that, after analyzing telephone company toll slips showing the destination of calls,[2] he believed, as an expert on

[1] "App." refers to the printed appendix in the court of appeals on file with the Clerk of this Court.

[2] The Internal Revenue Service had obtained the toll slips by civil summons under 26 U.S.C. 7602.

illegal wagering, that an extensive illicit gambling operation was being conducted at fourteen locations in the Pittsburgh area (App. 343a–345a). One location specified in the affidavit was apartment 4–C, 1806 Patricia Lane, East McKeesport, Pennsylvania, where two telephone numbers, (412) 824–5450 and (412) 824–8148, were listed under the name "Mrs. F. Lancer" (App. 347a). The affidavit detailed data on calls made to and from these numbers during the six-month period from September 25, 1966 to March 24, 1967.[3]

The summary of information on the toll slips reflected that more than six hundred long-distance telephone calls had been made either to or from the two telephones, with the connections all to telephones at three other suspected gambling locations cited in the affidavit (App. 346a–347a, 372a–373a). Among the suspected gambling locations linked in this manner to apartment 4–C was a tavern at 307 Ford Street, Ford City, Pennsylvania, where three telephone numbers were listed to one Michael Petro (App. 347a, 373a). According to the affidavit, toll slips showed four hundred forty-three long-distance calls between these two locations (App. 375a). The affidavit stated that, on April 29, 1967, an IRS special agent went to the tavern at 307 Ford Street, and "heard considerable conversation relative to betting, heard the San Francisco line quoted as 8 to 5, and observed numerous men visit a small portion of the living area in the

[3] The affidavit explained that there was no information on phone calls made after March 24 because toll slips for a month are not available from the telephone company until one week after the date of a customer's monthly bill (App. 347a–348a).

back where a man believed to be Mike Petro was" (App. 375a–376a).

In addition to setting forth the toll slip evidence, the affidavit stated (App. 374a):

> On November 15, 1966, a confidential informant whom Special Agent Vernon B. Carpenter regards as unquestionably reliable with regards to wagering and bookmaking operations and information told special Agent Carpenter that an unidentified white male was accepting a lot of sporting bets on telephone #824–5450. This confidential informant has supplied Special Agent Carpenter with considerable information in the past relative to wagering operations which has proven to be reliable and accurate.
>
> At approximately 3:05 p.m. on April 28, 1967, Special Agent John J. Kish observed a white male with black wavy hair and stocky build looking out the window of apartment 4–C, 1806 Patricia Lane, East McKeesport, Pennsylvania. At 3:50 p.m., Special Agent Kish observed the aforementioned white male sitting in apartment 4–C, and talking on the telephone.

On the afternoon of May 5, 1967, the three agents assigned to execute the warrants arrived at 1806 Patricia Lane in East McKeesport. At 1:30 p.m., agents Kish and Martin knocked on the door of apartment 4–C (App. 85a, 94a); agent Ziemba had stationed himself outside the apartment's bedroom window (App. 100a). Kish and Martin identified themselves in loud voices and stated that they had search warrants. They heard movement within the apartment,

but no one opened the door. After Martin tried unsuccessfully to break down the door, it was opened by one Sally Yenchi, a friend of petitioner. As Kish and Martin entered the apartment, they heard a toilet flushing. They rushed to the bathroom and saw petitioner standing over the toilet. The agents brushed petitioner aside and retrieved two baseball "line sheets" from the toilet bowl (App. 94a–96a, 177a–178a).

Kish and Martin then confronted petitioner, who fit the description in the "John Doe" search warrant, in the hallway outside the bathroom; they displayed their badges and again identified themselves (App. 47a, 98a). Petitioner asked to see the search warrants (App. 99a), and agent Kish went to get hi attaché case containing both warrants. In Kish's absence, petitioner, followed by agent Martin, walked into the bedroom. Agent Kish entered the bedroom, and began to read aloud the "John Doe" warrant.

As Kish started to read, petitioner grabbed the warrant from him, crumpled it, and threw it on the floor. He then pushed agent Kish aside and lunged at agent Martin; petitioner and Martin struggled and fell to the floor. As he fell, petitioner began to pull violently on the wire connecting one of the apartment's telephones to the wall. Agent Ziemba, who had left his post outside the window, grabbed the cord nearer the wall and pulled in the opposite direction from petitioner. All three agents struggled to restrain petitioner; during the struggle, petitioner hit agent Kish on the jaw with his elbow and kicked agent

Ziemba in the groin. Agent Kish finally subdued petitioner by hitting him with a blackjack (App. 100a–104a, 117a–119a). After handcuffing petitioner, the agents took him to the kitchen to apply a wet towel to a cut on his head. While there, petitioner again struggled with the agents in a vain effort to rip a telephone extension from the wall (App. 123a–124a).

ARGUMENT

1. a. The toll slip data set forth in the affidavit were sufficiently recent to constitute probable cause for the issuance of the search warrants. As explained in the affidavit, the lack of data for the six-week period between the time when telephone records were last available (March 24, 1967) and May 5, 1967, the date of the search, resulted from accounting practices of the telephone company, not from any change in the use of the telephone numbers under investigation. All toll slips available at the time the warrants were issued showed an uninterrupted pattern of wagering activity continuing for six months. The court of appeals properly concluded that this toll slip evidence by itself was sufficient to support the Commissioner's inference that the wagering had probably continued through May 5; there was no evidence available to the investigating officers casting doubt on that inference (Pet. App. A 23).

The tip received from the informant that sports bets were still being received as late as May 2 provided further evidence that the illegal gambling continued during the interval for which toll slips were not available. Petitioner contends that the section of the affi-

davit dealing with the informant fails to meet the requirements set by this Court in *Aguilar* v. *Texas,* 378 U.S. 108, and *Spinelli* v. *United States,* 393 U.S. 410. There is, however, no need for this Court to reach that question, since, as the court below held, the informant aspect was not the sole basis for establishing probable cause (see Pet. App. A 24).

b. The contention by petitioner that the affidavit's description of him was insufficiently detailed to constitute probable cause for issuance of the "John Doe" warrant is without merit. While many persons fit the description "white male with black wavy hair and stocky build," the qualifier, "using the telephone in apartment 4–C"—a statement of the exact location where "John Doe" could be found—provided a reasonably certain basis for identifying petitioner as the person to whom the warrant was directed. Petitioner's reliance on *West* v. *Cabell,* 153 U.S. 78, and *Wong Sun* v. *United States,* 371 U.S. 471, is misplaced. *West* involved a warrant which, though specifying a person by name, was nevertheless executed against someone else. In *Wong Sun,* federal agents, acting without a warrant on the basis of a tip that narcotics were being sold at a particular laundry, arrested a person previously unknown to them in a laundry they selected, without first determining whether it was the one described by the informant. In contrast, the agents here clearly executed the warrant against the person to whom it was directed, having first carefully ascertaining that they were at the premises referred to by the informant and designated in the warrants.

2. Finally, petitioner argues, on the premise that the search was illegal, that he had a right to resist its execution by known federal agents. Even assuming, however, that the warrants were issued without probable cause, petitioner had no right forcibly to resist the government agents. As the court below observed, if petitioner wished to test the legality of the warrants, legal means short of violence were available to him (Pet. App. A 26–27). The executing agents, who acted in good faith in accordance with their duties, clearly were entitled to the personal protection contemplated by the criminal statute. See *Hodgdon* v. *United States,* 365 F. 2d 679, 685 (C.A. 8), certiorari denied, 385 U.S. 1029. Both *John Bad Elk* v. *United States,* 177 U.S. 529, and *United States* v. *Di Re,* 332 U.S. 581, on which petitioner relies, dealt only with resistance to unlawful arrests made without a warrant and are inapposite.[4] Here, warrants had been duly issued, and petitioner's resistance was not to an arrest or other restraint upon his own person, but to the search of the apartment.

[4] We note, moreover that there is growing authority that the vitality of *John Bad Elk* and *Di Re* is waning. See *United States* v. *Simon,* 409 F. 2d 474, 477 (C.A. 7), certiorari denied, 396 U.S. 829; *United States* v. *Heliczer,* 373 F. 2d 241, 246 n. 3 (C.A. 2), certiorari denied, 388 U.S. 917. *United States* v. *Vigil,* 431 F. 2d 1037, 1042 (C.A. 10), certiorari denied, February 22, 1971 (No. 6188, this Term).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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